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WASHINGTON WATER RIGHTS — A SKETCH

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The federal government acquired title to the land which is now the State of Washington by treaty with England in 1846.[1] This land was subject to Congress' power of rule making,[2] and, precluded only by rights that had accrued prior to acquisition by the United States,[3] Congress could dispose of it as public domain.[4] Congress' power over lands not appropriated within the state's boundaries continues today as all rights thereto were expressly disclaimed by the people of the state upon entry into the Union.[5]

The general water policy applicable to unappropriated land within Washington Territory was that of prior appropriation and was announced by the Congress at an early date.[6] Congressional enactments were passed in order to conform policy to the then existing practice of appropriation of water to a beneficial use and to encourage settlement of new areas.[7] The Desert Land Act[8] of 1877 effected a severance of all unappropriated non-navigable water from the public domain and made these waters *publici juris*.[9] In addition, the states, including those forthcoming from the territories, were given plenary control over the severed water and were allowed to determine for themselves to what extent the rule of appropriation or the common-law rules of riparian rights should apply to acquisition of water rights by private persons.[10] The effect of the federal legislation then did not bind the states to any one water policy, but instead adopted the law of each state as the federal law to be applied within the state's boundaries.[11]

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[1] Treaty With Great Britain in regard to limits westward of the Rocky Mountains, June 15, 1846, 9 STAT. 869 (effective August 5, 1846). See Lownsdale v. Parrish, 62 U.S. (21 How.) 290 (1859) for earlier development.

[2] U.S. CONST. art. IV, § 3, cl. 2; See U.S. v. Fitzgerald, 40 U.S. (15 Pet.) 407 (1841).

[3] See Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839); Beecher v. Wetherby, 95 U.S. 517 (1877); See 1 KINNEY, IRRIGATION AND WATER RIGHTS §§ 402, 404, 405 (2nd ed. 1912).

[4] See note 2 *supra*; also Howell v. Johnson, 89 Fed. 556 (C.C. D.Mont. 1898).

[5] WASH. CONST. art. XXVI, § 2.

[6] 14 STAT. 253 (1866), 30 U.S.C. § 51 (1952); 16 STAT. 218 (1870), 30 U.S.C. § 52 (1952); 19 STAT. 377 (1877), 43 U.S.C. § 321 (1952); See California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1934).

[7] II KINNEY, IRRIGATION AND WATER RIGHTS § 805 (2nd ed. 1912).

[8] 19 STAT. 377 (1877), 43 U.S.C. § 321 (1952).

[9] California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, (1934).

[10] *Id.* at 164.

[11] *Ibid;* U.S. v. Ahtanum Irrigation Dist. 124 F. Supp. 818 (W.D. Wash. 1954).

In 1897 the State of Washington, in *Benton v. Johncox*,[12] approved *Lux v. Haggin*[13] thereby adopting what has come to be known as the "California Doctrine"[14] which recognizes one's ability, under certain circumstances, to acquire water rights in the first instance either through ownership of riparian land or through following state appropriation procedures, or both.[15]

RIPARIAN RIGHTS

The general principle of Washington riparian water rights is that every owner of land through which a natural stream of water flows or abuts has a reasonable usufruct in that stream as it passes along, and has an equal reasonable right with other riparian owners above and below him, to the natural flow and produce of the water in its accustomed channel free from unreasonable detention or substantial diminution in quantity or quality. No riparian owner may make any use of the water unreasonably prejudicial to other riparian owners, unless he has acquired a right to do so by license, grant or prescription.[16] The doctrine of riparian rights to the use of water is a rule of property law in this state,[17] and should private rights in public riparian lands be initiated by patenting these lands prior to appropriation of water from them, the rights of the riparian owners are to be determined by rules of the common-law and not by the rules of appropriation.[18] Riparian water rights are an adjunct of the land and are inseparably annexed to the soil that abuts on a natural water course.[19]

[12] 17 Wash. 277, 49 Pac. 495, 39 L.R.A. 107 (1897).

[13] 69 Cal. 325, 4 Pac. 919, 10 Pac. 674 (1884).

[14] Some of the other states following the doctrine are: Kansas, Montana, North Dakota and South Dakota. Partially following it are: Nebraska, Oregon and Texas. For further discussion see I WIEL, WATER RIGHTS IN THE WESTERN STATES Ch. 5, 6, 7 (3rd. ed. 1911).

[15] For a more complete discussion see Horowitz, *Riparian And Appropriation Rights To The Use of Water in Washington*, 7 WASH. L. REV. 197 (1932); BAILEY, WASHINGTON WATER RIGHTS (1923); BELCHER, WATERS AND WATER COURSES IN THE STATE OF WASHINGTON (1946).

[16] Riparian water rights attach to lands abutting on a lake (littoral rights) as well as to those lands abutting on a stream. Riparian rights do not attach to school lands until they pass into private ownership (the same rule is applied to Indian lands). Hough v. Taylor, 110 Wash. 361, 188 Pac. 458 (1920); *In re* Doan Creek, 125 Wash. 14, 215 Pac. 343 (1923); See *In re* Crab Creek And Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925) for a discussion of Colburn v. Winchell, 97 Wash. 27, 165 Pac. 1078 (1917) and *In re* Doan Creek, *supra.*, also note *Ex rel* Olding v. Stamply, 69 Wash. 368, 125 Pac. 148 (1912) indicating that water courses found on school lands are subject to appropriation.

[17] Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032 (1907).

[18] Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913). Riparian rights date from the first steps necessarily taken in order to secure a patent from the government. See also *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924).

[19] Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L.R.A. 425 (1894); Hayward v. Mason, 54 Wash. 653, 104 Pac. 141 (1909). This includes an

A natural water course is one which has a regular channel with a bed and well defined banks and through which a current of water usually flows.[20] The flow need not be continuous, and at times, the channel may be dry, but there must be an overall substantial existence.[21] A natural water course retains its identity even though it discharges into a swamp or swag, provided however, that during a large portion of each year currents flow throughout the course of the swamp or swag and are confined to regular well defined channels.[22] The fact that a stream channel having bed, banks and current has been artificially deepened for drainage purposes, and is sometimes dry, does not deprive it of the character of a water course.[23] A creek that rises and sinks along its course as the soil changes from bed rock to porous, and carries water its entire length only during the spring, is a natural water course.[24] But, where water flows only in the late winter or early spring when the ground is frozen and snow is melting, there can be no water course having bed, banks and current because the water is surface drainage occasioned by an unusual freshet.[25] Surface water may form a natural water course at a point where a reasonably well defined channel is formed having bed, banks or sides and current, although the stream may be very small and the water may not flow continuously.[26] Should springs form the fountainhead of a living water course, they become part and parcel of the stream.[27] The prerequisite element of a water course is that of current

owner whose boundaries extend over the bank and into the stream. State *ex rel* Davis v. Superior Court, 84 Wash. 252, 146 Pac. 609 (1915). See Hirt v. Entus, 37 Wn.2d 418, 224 P.2d 520 (1950) for the effect of accretion, reliction and avulsion on stream boundaries.

[20] Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314 (1889); Hastie v. Jenkins, 53 Wash. 21, 101 Pac. 495 (1909); 2 FARNHAM, WATERS AND WATER RIGHTS § 459 (1904); but note Miller v. Eastern Lumber Co., 84 Wash. 31, 146 Pac. 171 (1915) wherein the court relaxes the requirement of well defined banks.

[21] Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314 (1889); Tierney v. Yakima County, 136 Wash. 481, 239 Pac. 248 (1925); Harmon v. Gould, 1 Wn.2d 1, 94 P.2d 749 (1939).

[22] Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L.R.A. 425 (1894); Hastie v. Jenkins, 53 Wash. 21, 101 Pac. 495 (1909); Alexander v. Muenscher, 7 Wn.2d 557, 110 P.2d 625 (1941). Ordinarily a swamp or swale is not a water course. See Hayward v. Mason, 54 Wash. 653, 104 Pac. 141 (1909); I KINNEY, IRRIGATION & WATER RIGHTS § 316 (2nd ed. 1912).

[23] Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L.R.A. 425 (1894); Harmon v. Gould, 1 Wn.2d 1, 94 P.2d 749 (1939). If certain circumstances should be present, a ditch might be held to constitute a "natural" water course. See DeRuwe v. Morrison, 28 Wn.2d 797, 184 P.2d 273 (1947); Miller v. Eastern Lumber Co., 84 Wash. 31, 146 Pac. 171 (1915). *But cf.* Mason v. Yearwood, 58 Wash. 276, 108 Pac. 608, (1910).

[24] *In re* Johnson Creek, 159 Wash. 629, 294 Pac. 566 (1930).

[25] Thorpe v. Spokane, 78 Wash. 488, 139 Pac. 221 (1914). But note Oregon-Washington Nav. Co. v. Royer, 255 Fed. 881 (9th Cir. 1919).

[26] Alexander v. Muenscher, 7 Wn.2d 557, 110 P.2d 625 (1941); GOULD, WATERS § 263 (3rd ed. 1900).

[27] *In re* Ahtanum Creek, 139 Wash. 84, 245 Pac. 758 (1926).

or flow,[28] but the question of whether or not certain waters constitute a water course is one of fact and properly for the jury to determine.[29] Riparian rights do not exist in navigable water courses,[30] although they do exist in those non-navigable,[31] because the state is the owner of the bed and banks[32] and the riparian proprietor owns none of the soil under or abutting on the navigable water course.[33]

Riparian rights in non-navigable streams are neither easements nor appurtenances to the land, but are inseparably attached to the soil and pass by a grant of the land, unless specifically reserved.[34] If a riparian owner should assert a claim of right to water allegedly gained by following appropriation procedures, he does not waive his riparian rights nor is his claim antagonistic to them.[35] The situs of riparian rights has been confined within the points where the land abuts upon the stream and a lower riparian was not allowed, by virtue of his riparian rights, to divert waters from a point on the stream above his uppermost tangential point.[36] The riparian proprietor does have an interest in parts of the stream above and below him and may enjoin lesser uses of the water that do him substantial injury.[37] However, an upper riparian owner cannot compel a lower water user to maintain either drainage ditches or dams even though their discontinuance should do him

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[28] DeRuwe v. Morrison, 28 Wn.2d 797, 184 P.2d 273 (1947).

[29] Tierney v. Yakima County, 136 Wash. 481, 239 Pac. 248 (1925). Rights to underground flow will be protected in the same manner as those upon the surface, provided the flow is within a true underground water course, and the presumption, once a subterranean water course is shown to exist, is that it possesses a fixed and definite course and channel varying only with the erosion which the water produces. Evans v. City of Seattle, 182 Wash. 450, 47 P.2d 984 (1935).

[30] *Ex rel* Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945 (1912); see also Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925).

[31] Benton v. Johncox, 17 Wash. 277, 39 Pac. 485, 39 L.R.A. 107 (1897). If the stream be navigable then the high water mark delimits its boundary, and if non-navigable, the thread of the stream. Harper v. Holston, 119 Wash. 436, 205 Pac. 1062 (1922). See also Hirt v. Entus, 37 Wn.2d 418, 224 P.2d 620 (1950).

[32] WASH. CONST. art. XVII § 1. Title to non-navigable stream beds passes to the patentee as an incident of the patent. See Griffith v. Holman, 23 Wash. 347, 63 Pac. 239 (1909); also non-navigable lakes, see *In re* Clinton Water District, 36 Wn.2d 284, 218 P.2d 309 (1950).

[33] They do attach to non-navigable water courses whose sources are navigable lakes. New Whatcom v. Fair Hoven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190 (1901).

[34] Benton v. Johncox, 17 Wash. 277, 39 Pac. 485 (1897).

[35] Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032 (1907). But neither does he have a right to appropriate superior to others. *Ex rel* Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945 (1912).

[36] See Miller v. Baker, 68 Wash. 19, 122 Pac. 604 (1912).

[37] Kalama Light & Power Co. v. Kalama Driving Co., 48 Wash. 612, 94 Pac. 469, 22 L.R.A. (n.s.) 641 (1908); also see Longmire v. Yakima Highlands Co., 95 Wash. 302, 163 Pac. 782 (1923); *In re* Sinlahekin Creek, 162 Wash. 635, 299 Pac. 649 (1931). He has the right to recurrent natural overflow from a stream. Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. 466 (1911).

injury.[38] If a segment of a tract of riparian land be severed in a way so the severed segment becomes non-riparian, it loses forever its riparian character, and a subsequent connection of the two tracts will not restore riparian qualities to the severed segment.[39] No Washington case has been found wherein it has been held that land, in order to be riparian, must be within the watershed of the stream as is the California rule.[40]

From early times this state has adhered to a reasonable use theory of riparian rights[41] rather than a strict natural flow theory.[42] The use of water by riparian proprietors must be reasonable, and waters of non-navigable streams[43] or lakes[44] in excess of the amount that can be used beneficially within a reasonable time (directly or prospectively) on riparian lands are subject to appropriation for use on non-riparian lands.[45] In other words, before he has any right of protest the riparian owner must, with reasonable certainty, show that either at present or within the near future, he will make use of the water for a beneficial purpose; otherwise, it is subject to appropriation.[46] The rights of riparian owners of the same use are coequal notwithstanding one riparian owner's right attaching prior to that of another.[47] No riparian owner has the exclusive right to use "all of the waters of a stream to the exclusion of other riparian owners, merely from the fact of his riparian ownership."[48] Water, when taken and used through an exercise of the riparian right, must be utilized on riparian land and is prohibited from use on non-riparian lands even though the non-riparian

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[38] Drainage Dist. No. 2 v. Everett, 171 Wash. 471, 18 P.2d 53, 88 A.L.R. 123 (1933); DeRuwe v. Morrison, 28 Wn.2d 797, 184 P.2d 273 (1947).

[39] *Ex rel* Ham, Yearsley & Ryrie v. Cater, 149 Wash. 285, 270 Pac. 804 (1928).

[40] Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L.R.A. (n.s.) 1062 (1906); Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533 (1938). See Yearsley v. Cater, note 39, *supra* at 289, where the court remarks: "This court in the case of *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 Pac. 41, seems to indicate an intention to follow the California rule in determining what constitutes riparian lands." *Cf.* Weidensteiner v. Engdahl, 125 Wash. 106, 215 Pac. 378 (1923).

[41] Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314 (1890).

[42] See *In re* Clinton Water District, 36 Wn.2d 284, 218 P.2d 309 (1950) (dissenting opinion); Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. 466 (1911); Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925).

[43] Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923).

[44] Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925).

[45] Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926).

[46] State v. American Fruit Growers, 135 Wash. 156, 237 Pac. 498 (1925); overruled on other grounds in *In re* Yand's Estate, 23 Wn.2d 831, 162 P.2d 434 (1945).

[47] Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926); McEvoy v. Taylor, 56 Wash. 357, 105 Pac. 851 (1909); Malley v. Weidensteiner, 88 Wash. 398, 153 Pac. 342 (1915); DeRuwe v. Morrison, 28 Wn.2d 797, 184 P.2d 273 (1947); *But cf.* Hayward v. Mason, 54 Wash. 653, 104 Pac. 141 (1909).

[48] Smith v. Nechanicky, 123 Wash. 8, 211 Pac. 880 (1923).

user may possess a grant or license from the riparian owner.[49] Rights of riparian owners to reasonable beneficial use of waters exist mutually,[50] and the courts have jurisdiction to apportion waters among them in order to secure to all riparian owners the reasonable use to which each is entitled.[51]

The highest reasonable use, and that which takes precedence over lesser uses, is the domestic or natural use.[52] Natural uses arise out of the direct necessities of life, *e.g.* household uses, drinking, washing and watering domestic animals, and these uses are of a higher priority than irrigation.[53] Riparian proprietors, as a class, may take a whole stream for domestic purposes, leaving none for other uses.[54] However, the use of water from a stream to supply inhabitants of a town for domestic purposes is not part of the riparian right.[55]

Artificial uses are those which are not intimately connected to life's necessities and are typified as uses for the purposes of improvement, trade or profit—chief of these in the arid West is irrigation.[56] The common-law doctrine of riparian rights and its application to artificial uses has been modified in Washington, at least as it applies to irrigation, and has had engrafted upon it the necessity of reasonable beneficial use by the riparian owner.[57] As between a riparian owner and an appropriator, the one first in time is first in right. If the riparian owner's claim be prior, he may take waters from the stream for irrigation purposes in such proportion as his riparian lands bear to the quantity of riparian land capable of being irrigated.[58] Should water in excess of the riparian claimant's share be found in the stream, it is

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[49] Alexander v. Muenscher, 7 Wn.2d 577, 110 P.2d 625 (1941).

[50] Smith v. Nechanicky, 123 Wash. 8, 211 Pac. 880 (1923).

[51] Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342 (1915); Thompson v. Short, 6 Wn.2d 71, 106 P.2d 720 (1940).

[52] Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926); I WIEL, WATER RIGHTS IN THE WESTERN STATES § 740 (3rd ed. 1911).

[53] Nesalous v. Walker, 45 Wash. 621, 88 Pac. 1032 (1907). In addition, riparian owners have exclusive fishing rights in the waters flowing over their lands. Griffith v. Holman, 23 Wash. 347, 63 Pac. 239 (1900).

[54] See Nielson v. Sponer, 46 Wash. 14, 89 Pac. 155 (1907); McEvoy v. Taylor, 56 Wash. 357, 105 Pac. 851 (1909). For domestic uses incident to lands riparian to a non-navigable lake see *In re* Clinton Water District, 36 Wn.2d 285, 218 P.2d 309 (1950); 8 WASH. L. REV. 79 (1952).

[55] Cartier Van Diesel v. Holland-Horr Mill Co., 91 Wash. 239, 157 Pac. 687 (1916).

[56] I WIEL, WATER RIGHTS IN THE WESTERN STATES § 743 (3rd ed. 1911).

[57] State v. American Fruit Growers, 135 Wash. 156, 237 Pac. 498 (1925); see notes 41, 46, *supra.*

[58] Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926). If the supply of water should be ample, the burden of showing a substantial injury from subsequent appropriation is upon the riparian owner; if the supply of water should be less than ample, the burden falls upon the appropriator to show that riparian rights will not be injured by the appropriation. Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923).

subject to appropriation for irrigation purposes on non-riparian lands.[59] Among themselves, riparian owners have correlative rights to the use of water for irrigation purposes, disregarding the fact that one riparian owner's right antedates that of another.[60] Riparian lands are not entitled, as agricultural lands, to share in an apportionment of water for irrigation purposes where they have been held for a long while in private ownership without being devoted to agricultural purposes, but rather, being devoted to timber purposes.[61] A riparian owner has the burden of showing his intention to bring more land under cultivation within a reasonable time, and should he fail to do so, he is entitled only to water sufficient to irrigate the land presently under cultivation.[62]

Among other artificial uses are those of a riparian owner to use the natural flow of a stream for the purpose of creating power for his electric light plant, and he may enjoin a log driving company from retarding the flow to his detriment.[63] A riparian owner operating a mill does not, however, have the right to flood adjacent lands through the maintenance of a dam for water power necessary to run the mill.[64]

In most jurisdictions riparian rights can be lost in many ways, but as a general proposition lack of use of riparian water rights will not destroy them.[65] In this state however, non-user directly and prospectively, does work a forfeiture of the riparian right to use water for irrigation purposes.[66] Since riparian water rights are inextricably bound up with the land, and considered as realty,[67] a riparian owner may lose his water rights as well as his land by adverse user.[68] Prescriptive rights to the use of water may be acquired against upstream or downstream riparian owners, but they require a showing of open, notorious, exclusive, hostile and continuous use and possession for a

[59] See note 58, *supra.*
[60] *Ibid.*
[61] See note 57, *supra.*
[62] See note 58, *supra.* A subsequent purchaser of riparian land is entitled to the same uses as his predecessor. *Ex rel* Ham, Yearsley & Ryrie v. Cater, 149 Wash. 285, 270 Pac. 804 (1928).
[63] Kalama Light & Power Co. v. Kalama Driving Co., 48 Wash. 612, 94 Pac. 469, (1908).
[64] Durga v. Lincoln Creek Lumber Co., 47 Wash. 477, 92 Pac. 343 (1907).
[65] *In re* Sinlahekin Creek, 162 Wash. 635, 299 Pac. 649 (1931); 2 FARNHAM, WATERS AND WATER RIGHTS §§ 463, 534 (1904).
[66] State v. American Fruit Growers, 135 Wash. 156, 237 Pac. 498 (1925); see note 46, *supra*; Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 WASH. L. REV. 197 (1932). By analogy, could non-user work a forfeiture of other artificial uses? Query: domestic uses? For the possible effect of non-user on the appropriative right see Thorpe v. McBride, 75 Wash. 466, 135 Pac. 228 (1913).
[67] Note 19, *supra*; see Madison v. McNeal, 171 Wash. 675, 19 P.2d 97 (1933).
[68] Smith v. Nechanicky, 123 Wash. 8, 211 Pac. 880 (1923); Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342 (1915).

period of ten years.[69] Prescriptive rights are not favored by the law,[70] but once the necessary conditions are met, a grant or owner's consent to the use of water as an easement therein will be presumed in favor of the adverse user.[71] Since only an easement can be obtained by prescription, it follows therefore, that a prescriptive right might be acquired without constant, continuous adverse user for the full statutory period, but might manifest itself as a seasonal use over the necessary number of years.[72] Further, the size of the easement would then be determined by the extent of the user.[73] In this state, the extent of the user is measured by the proportion of the total flow of the stream that was diverted by the prescriptive user and is not fixed as a specific quantity of water.[74] Prescriptive rights to water cannot be acquired until the riparian owner has been deprived of its use in such a substantial manner and degree so as to notify him that his right is being invaded.[75] The prescriptive period begins to run only after the adverse use amounts to an actual invasion of the rights of the true owner and a cause of action accrues to him.[76] This means that the use will not become adverse until an invasion affects the total user from the stream thereby eliminating all surplus waters so as to exceed and impinge upon the supply required by the true owner of the water right.[77] A permissive use for the full statutory period gives no prescriptive right;[78] however, what was begun as a possible permissive use can ripen into an adverse use under certain circumstances, and a prescriptive right might accrue. This is the case where the original owner for a long period of time recognizes a use inconsistent with his own and the adverse user expends funds in reliance thereon.[79] The burden of proof is, of course, upon the adverse

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[69] Smith v. Nechanicky, 123 Wash. 8, 211 Pac. 880 (1923).

[70] Downie v. Renton, 167 Wash. 374, 9 P.2d 372 (1932).

[71] Berryman v. East Hoquiam Boom & Logging Co., 68 Wash. 657, 125 Pac. 130 (1912); also see Wasmund v. Harm, 36 Wash. 170, 78 Pac. 777 (1904).

[72] If the acts of the alleged adverse user be at most desultory acts of trespass of short duration and occur at widely separated intervals, *e.g.*, discharging a reservoir into a stream twice a year, they lack sufficient continuity and no prescriptive right inures. Downie v. Renton, 167 Wash. 374, 9 P.2d 372 (1932); also see Annot. 93 Am. St. Rep. 711 (1902). Nor do prescriptive rights accrue where the character of the use changes from domestic to artificial during the period of the statute of limitations. Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1909).

[73] Mason v. Yearwood, 58 Wash. 276, 108 Pac. 608 (1910).

[74] Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342 (1915).

[75] *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924).

[76] St. Martin v. Skamania Boom Co., 79 Wash. 393, 140 Pac. 355 (1914).

[77] Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641 (1910).

[78] See note 77, *supra*; Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913).

[79] Lyons v. Ingle, 96 Wash. 95, 164 Pac. 745 (1917) *overruling* 91 Wash. 179, 157 Pac. 460 (1916). See also Allen v. Roseburg, 70 Wash. 422, 126 Pac. 900 (1912); Wilson v. Angelo, 176 Wash. 157, 28 P.2d 276 (1934).

claimant, and evidence of a prescriptive right must be clear and conclusive before one will be presumed.[80]

Riparian water rights can be lost by acquiescence,[81] laches[82] or, more importantly, by estoppel.[83] Where the proprietor of land over which a stream flows diverts it into an artificial channel and suffers it to remain in its changed condition for a period exceeding the statute of limitations he is estopped as against one making a beneficial use thereof, and he may not return the stream to its natural channel to the beneficial user's loss and injury.[84] The beneficial user need not show a prescriptive right in himself, nor a continuous use exceeding the statute of limitations; what he must show is that the owner of the water right diverted the stream and allowed it to remain in its changed state for the duration of the statute of limitations, and that he has made a beneficial use thereof relying upon the permanency of the change.[85] An estoppel will not operate in favor of a water claimant who violates a prior decree adjudicating his rights thereto, because such a claimant could not honestly believe that he had a right to use the water after the decree.[86] If a littoral owner merely stands by while a wrongdoer incurs expense in construction,[87] there can be no estoppel provided the littoral owner has done nothing to influence or which was intended to influence the construction which, of course, cannot be on the littoral owner's land.[88] A statutory estoppel is found in the water code.[89] No Washington case has been found wherein a riparian owner has been deprived of his water rights because of avulsion.[90]

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[80] *In re* Ahtanum Creek, 139 Wash. 84, 245 Pac. 758 (1926).

[81] Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901).

[82] Mason v. Yearwood, 105 Wash. 335, 177 Pac. 777 (1919); see also Mason v. Yearwood, 58 Wash. 276, 108 Pac. 608 (1910). Laches and acquiescence bar an injunction from issuing because of lack of diligence in seeking the remedy; whereas, estoppel bars the right whatever remedial device be employed.

[83] Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1909). In addition, riparian rights might be lost through non-user, prescription, avulsion or exercise of the power of eminent domain. For the last see WASH. CONST. art. I, § 16, art. 16 § 1 and RCW 90.04.020, 90.04.030 and cases falling thereunder.

[84] Hollet v. Davis, 54 Wash. 326, 103 Pac. 423 (1909).

[85] *Id.* at 333, 103 Pac. at 426.

[86] *In re* Ahtanum Creek, 139 Wash. 84, 245 Pac. 758 (1926).

[87] Construction of a dam across an arm of a lake in such a manner so as to withdraw water from the littoral owner's realty.

[88] Madison v. Spokane Valley Land & Water Co., 40 Wash. 414, 82 Pac. 718 (1905).

[89] RCW 90.12.120 "Any defendant who fails to appear in the proceedings after service, and submit proof of his claim, shall be estopped from subsequently asserting any right to the use of the water in question, except as determined by the decree."

[90] See Wholey v. Caldwell, 108 Cal. 95, 41 Pac. 31, 30 L.R.A. 820 (1895); McKissick Cattle Co. v. Alsoga, 41 Cal. App. 380, 182 Pac. 793 (1919); Butts v. Cummings, 117 Cal. App. 2d 334, 256 P.2d 52 (1953). Note Sumner Lumber Co. v. Pacific Coast Power Co., 72 Wash. 631, 131 Pac. 220 (1913) for a possible acquisition of riparian rights because of avulsion. *Cf.* Hirt v. Entus, 37 Wn.2d 418, 224 P.2d 620 (1950).

APPROPRIATION RIGHTS

The heart of Washington's present water law system lies in the application of the doctrine of prior appropriation to the water resources of the state. The essence of this system lies in the Western necessity of putting water to a beneficial use.[91] Under this system, water rights date in accordance with the theory that he who is prior in time is prior in right. The water right acquired by the appropriator is a usufructuary right only, *i.e.* the right to make use of the water, and consists not so much of the fluid itself as the advantages flowing from its use.[92] Water, itself, can become personal property where circumstances are such that it is severed from its original source of supply and reduced to the exclusive possession of the appropriator—the usual case being a diversion of water into a ditch.[93] An appropriative water right has been held to be realty at least if acquired since 1866,[94] and it descends by inheritance. It is an incorporeal hereditament as it is neither tangible nor visible.[95] An action to quiet title to a water right will lie,[96] and it can be a proper subject of a contract of sale.[97] An appropriative right gives an interest in the quality of the stream fixed as of the time of the appropriation, and a prior appropriator may enjoin subsequent pollution which would render the water unfit for the use for which it was appropriated.[98]

Washington has employed three varying types of appropriation systems during its water law history; they are custom, notice and permit. Acquisition of water rights through an appropriation of water from the public domain in conformity with early prevailing customs was recognized quickly in this state.[99] Such an appropriation consisted of an intention to appropriate followed by reasonable diligence in applying

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[91] Washington v. Oregon, 297 U.S. 517 (1936); See also U.S. v. Big Bend Transit Co., 42 F. Supp. 459 (E. D. Wash. 1941).

[92] See Madison v. McNeal, 171 Wash. 669, 19 P.2d 97 (1933); Tyler v. Wilkinson, 24 Fed. Cas. 471, No. 14, 312 (C.C.D.C. 1827); Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408 (1853); I WIEL, WATER RIGHTS IN THE WESTERN STATES § 18 (3rd ed. 1911).

[93] See Madison v. McNeal, 171 Wash. 669, 19 P.2d 97 (1933); II KINNEY, IRRIGATION AND WATER RIGHTS § 773 (2nd ed. 1912); I WIEL, WATER RIGHTS IN THE WESTERN STATES § 35 (3rd ed. 1911). California holds that water becomes personal property only when delivered at the spigot to the consumer. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024 (1895).

[94] Adamson v. Black Rock Power Co., 12 F.2d 437 (9th Cir. 1926); Madison v. McNeal, 171 Wash. 669, 19 P.2d 97 (1933).

[95] See Madison v. McNeal, 171 Wash. 669, 19 P.2d 97 (1933).

[96] Barnes v. Belsaas, 73 Wash. 205, 131 Pac. 817 (1913); note also Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. 996 (1902).

[97] Thompson Co. v. Pennebaker, 173 Fed. 849 (9th Cir. 1909).

[98] Naches v. Cowiche Ditch Co., 87 Wash. 224, 151 Pac. 494 (1915) (dictum).

[99] Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588 (1889); Isaacs v. Barber, 10 Wash. 124, 38 Pac. 871 (1894).

the water to a beneficial use.[100] Posting a notice at the diversion site, or elsewhere, was not required.[101] And, should the appropriator's original intent be to appropriate water for an extended tract, while, in fact, water is appropriated only for a portion thereof,[102] the appropriator is entitled to water for the entire area originally conceived provided the remainder of the extended tract is brought under cultivation with reasonable diligence.[103] In such a case, the water right for the whole tract dates from the time of the beginning of the work on the initial diversion.[104]

A notice system setting forth certain requirements and formalities to be followed when acquiring water rights by appropriation from the public domain was adopted in statutory form in 1891,[105] and later repealed when the water code was adopted in 1917.[106] The statutes required, among other things, that an appropriator post a notice at his proposed point of diversion setting forth: his intent to appropriate, the amount of water sought, the purpose of the appropriation, the place where the water was to be used and the means used to divert the water. Strict compliance with all technical terms of the act was required,[107] and, if present, the date of the water right so acquired related back to the time of posting the notice.[108] The notice system was not exclusive, and should notice neither be posted nor filed, a water right could accrue, by virtue of custom, to an appropriator who had made an actual appropriation in accordance with customary procedures.[109]

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[100] Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1899); Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913); *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924).

[101] Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091 (1908); *In re* Crab Creek and Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925); although not required, notice of an appropriation can be used to help establish appropriative rights secured by custom where it was followed by an actual appropriation. Allison v. Linn, 139 Wash. 474, 247 Pac. 731 (1926).

[102] The entire tract was 120 acres and the initial appropriation serviced 20 acres. *In re* Crab Creek and Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925).

[103] *Id.* at 16, 235 Pac. at 40 See Still v. Palouse Irr. Co., 64 Wash. 606, 117 Pac. 466 (1911) as an example where due diligence was found lacking. Should riparian rights attach to other owners during the "diligence period," they are subsequent to the later perfected but earlier initiated appropriation rights. See *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924).

[104] *In re* Crab Creek And Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925).

[105] Wash. Sess. Laws 1891, c. 21.

[106] Wash. Sess. Laws 1917, c. 117; also see Horowitz, *Riparian And Appropriation Rights to The Use of Water In Washington*, 7 WASH. L. REV. 197 (1932) for a discussion of early legislation.

[107] *In re* Icicle Creek, 159 Wash. 524, 294 Pac. 245 (1930); see also Pleasant Valley Power Co. v. Okanogan Power Co., 98 Wash. 401, 167 Pac. 1122 (1917).

[108] *In re* Ham, Yearsley and Ryrie v. Superior Ct., 70 Wash. 442, 126 Pac. 945 (1912).

[109] *In re* Crab Creek And Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925). The important difference between the two systems lies in the effective date of the water right which is then used to determine priority ratings.

The presently active statutes setting forth a permit system whereby appropriation rights to the use of water may be acquired are found in the water code.[110] There can be no doubt that since the adoption of the permit system in 1917 it is exclusive, and all new rights to the use of water by appropriation can only be obtained through a compliance with these procedures.[111] In fact, the wording of one section is so strongly in favor of prior appropriation as the water policy of the state that probably no new riparian rights may be acquired after 1917 even though one acquires previously unpatented riparian land.[112]

Under the present permit system, the expectant appropriator must apply to the supervisor of water resources for permission to use the public waters before making a diversion.[113] A temporary permit for the use of water may be obtained pending the supervisor's determination on the application. The supervisor must make a determination of, among other things, the existence of water subject to appropriation, the beneficial uses to which it may be put and whether the proposed use conflicts with existing rights or with the public interest.[114] If the proposed use should violate any of the above enumerated items then the supervisor must reject the application for permit; otherwise, one will issue.[115] After filing the application for a permit the applicant must, on the supervisor's instructions, publish notice of the application in newspapers published at the county seat of the proposed diversion and at the county seat of the prospective site of the beneficial use.[116] Assuming that the permit be granted and the right acquired by appropriation be perfected, it relates back and dates as of the time of filing the original application in the office of the supervisor.[117]

Either a riparian[118] landowner or a non-riparian[119] landowner can acquire water rights to the use of water by appropriation. The situation

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[110] RCW 90.20.010 to 90.20.110.

[111] See RCW 90.04.020.

[112] RCW 90.04.020 reads, *inter alia*, "Subject to existing rights, *all waters*, within the state belong to the public, and *any right thereto*, or to the use thereof, shall be acquired *only by appropriation* for a beneficial use and as *provided in this title*." (emphasis supplied). This statute would not apply to riparian lands acquired before its enactment.

[113] RCW 90.20.010.

[114] RCW 90.20.050.

[115] RCW 90.20.060.

[116] RCW 90.20.040.

[117] RCW 90.20.110. Other western states following a version of the permit system are: Arizona, California, Kansas, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah and Wyoming.

[118] See Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1899); Haberman v. Sander, 166 Wash. 453, 7 P.2d 563 (1932).

[119] Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923); Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926).

becomes unclear when one not a landowner seeks to appropriate. The water code does not state clearly whether or not the appropriator must be the owner of an interest in land,[120] but it does contemplate that appropriation rights acquired for irrigation purposes may become appurtenant to the irrigated lands.[121] Prior to the water code, it has been held that an appropriator must own or have an interest in the land;[122] however, it might be sufficient if the appropriator be an actual bona fide settler of the land having a possessory interest therein, but there must be evidence of intent to acquire title in such a case.[123] "No rights flow from the diversion and use of water by a mere squatter."[124] In addition to its rights that may be secured by an exercise of the power of eminent domain, the federal government is allowed to appropriate water in conformity with state procedures and is treated in the same fashion as is an individual appropriator.[125]

All surplus surface[126] or ground[127] water found on public land in non-navigable water courses is subject to appropriation whether it be found on the public lands of the federal or state[128] government. This includes non-navigable water courses found on school lands held by the state.[129] Pools of seepage water in a bog or marsh, on public land, having neither inlet, outlet or flow nor fed by springs, do not constitute the character of surface water authorized to be appropriated[130] for they are not within a water course.[131] As a general proposition, a water course must have

[120] See RCW 90.20.010. The water supervisor requires a statement of the interest in the land owned by the prospective appropriator.

[121] RCW 90.28.090, 90.20.060; U.S. v. Ahtanum Irr. Dist., 124 F. Supp. 818 (W. D. Wash. 1954).

[122] *In re* Waters of Doan Creek, 125 Wash. 14, 215 Pac. 343 (1923) (Lessees from the state without an ownership interest in the land and with no intent of acquiring the land could not be bona fide appropriators.) See also *In re* Ahtanum Creek, 139 Wash. 84, 245 Pac. 758 (1926).

[123] Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913). The same is true of a speculating squatter on relinquished government land who has made no entry in his own behalf. Avery v. Johnson, 59 Wash. 332, 109 Pac. 1028 (1910).

[124] Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913). Query: can an adverse possessor acquire an appropriative right during the period of the statute of limitations?

[125] RCW 90.40.040; Burley v. United States, 179 Fed. 1 (9th Cir. 1910). Except no fees are charged the Federal Government.

[126] RCW 90.04.020.

[127] The ground water section applies the doctrine of prior appropriation to all natural ground waters (those underground waters with ascertainable boundaries) and to all artificial ground waters that have been abandoned or forfeited but not to percolating ground water. RCW 90.44.040. See Elgin v. Weatherstone, 123 Wash. 429, 212 Pac. 562 (1923) for an application of appropriation doctrine to percolating and vagrant waters.

[128] *In re* Crab Creek and Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925).

[129] The rule used to be different. See Colburn v. Winchell, 97 Wash. 27, 165 Pac. 1078 (1917) as modified by *In re* Crab Creek and Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925).

[130] Dickey v. Maddux, 48 Wash. 411, 93 Pac. 1090 (1908).

[131] Pays v. Roseburg, 123 Wash. 82, 211 Pac. 750 (1923).

water that usually flows through a regular channel with bed and sides,[132] but it need not have a mouth, and springs may form its fountainhead.[133] An appropriator may appropriate surplus water from a navigable stream[134] in conformity with state appropriation procedures so long as the total appropriation from the stream does not impair its navigability.[135] Likewise, water between high and low water marks on a navigable lake is subject to appropriation.[136] Further, should there be water in a non-navigable natural water course in excess of the amount that can be beneficially used within a reasonable time by the riparian owners, that water is subject to appropriation.[137] However, water of non-navigable stream within Indian reservations is not subject to appropriation as against subsequent riparian owners of lands within such reservations.[138] It should be noted that whenever an appropriator seeks to obtain water from federally controlled public domain located in the State of Washington, he must follow the Washington appropriation procedure to obtain the water right, and further, he must comply with federal statutes to obtain a ditch right-of-way.[139]

Prior to the water code an appropriation of water consisted of an intention to appropriate followed by reasonable diligence in applying the water to a beneficial use.[140] The first step involved making a claim to a given amount of water evincing thereby a clear intent to appropriate. Evidence of intent to appropriate is unequivocal when the appropriator has proceeded under the notice system and posted notice of his claim, and likewise, under the current permit system by filing an application for a specific amount of water plus publishing notice thereof; however, it is not as clear when the appropriator has proceeded in accordance with custom. In such a case the fact of acquiring rights to

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[132] Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314 (1889).

[133] *In re* Johnson Creek, 159 Wash. 629, 294 Pac. 566 (1930); see notes 20-29, *supra*.

[134] The state test of navigability is found in Kemp v. Putnam, 47 Wn.2d 530, 288 P.2d 837 (1955); for the federal view see Oklahoma *ex rel.* Phillips v. G. F. Atkinson Co., 313 U.S. 508 (1941), and Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8.

[135] U.S. v. Rio Grande Co., 174 U.S. 690 (1898); *In re* Crab Creek And Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925); see Washington v. F.P.C., 207 Fed. 391 (9th Cir. 1953) for an example of administrative exercise of the commerce power superior to state controls over a navigable stream.

[136] Ortel v. Stone, 119 Wash. 500, 205 Pac. 1055 (1922).

[137] Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923); Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926); *In re* Sinlahekin Creek, 162 Wash. 635, 299 Pac. 649 (1931).

[138] Hough v. Taylor, 110 Wash. 361, 188 Pac. 458 (1920).

[139] Blue Creek Land Co. v. Battle Creek Sheep Co., 52 Idaho 728, 19 P.2d 628 (1933); see 43 C.F.R. 244 (1954).

[140] Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1889); Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913).

land, an appropriator's residence thereon, and the cultivation of the soil as well as the use to which the water has been put are all factors in inferring the intent to appropriate.[141]

Since the right to use the water beneficially is the essence of an appropriation, the means by which it is done are incidental.[142] A diversion can be made into an existing natural water course which is currently carrying a flow of water.[143] Nontheless, a mechanical diversion of the water is usually contemplated.[144] No Washington case has been found wherein the discussion was directed specifically to whether or not a mechanical diversion is necessary, and cases from other jurisdictions differ. Where stock was watered from a natural water course for forty years without any means of an artificial or mechanical method of diverting water, it was held to be a valid appropriation.[145] On facts similar to those above, the Utah court disallowed an alleged appropriation for stock watering purposes where the purported appropriator failed to show an exclusive use in himself.[146] Colorado has indicated that an appropriation might be perfected without a mechanical diversion,[147] but not for agricultural purposes.[148] In any event, should a diversion be started and successfully completed, an appropriator's rights relate back and date as of the beginning of the actual work and not from the date of the actual diversion, provided the work has been prosecuted with reasonable diligence.[149] This includes the survey necessary prior to the beginning of the actual construction work in the case of an appropriation for power purposes.[150] The answer as to what constitutes reasonable diligence must depend to a large extent upon the circumstances of each case as the law does not require an immediate use of the water, and the doctrine of common sense applies.[151] One who is less diligent may not urge lack of diligence to

[141] Longmire v. Smith, 26 Wash. 439, 67 Pac. 246, 58 L.R.A. 308 (1901).
[142] Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1889).
[143] Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641 (1910).
[144] See RCW 90.20.020; Grant Realty Co. v. Ham, Yearsley & Ryrie, 96 Wash. 616, 626, 165 Pac. 495, 499 (1917).
[145] Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 295 Pac. 772 (1931). This case indicates that a diversion for agricultural purposes is absolutely necessary, but that a waterfall used for power purposes need not be diverted.
[146] Robinson v. Schoenfeld, 62 Utah 233, 218 Pac. 1041 (1923).
[147] Empire Water Co. v. Cascade, 205 Fed. 123 (8th Cir. 1913).
[148] Windsor Canal Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729 (1908).
[149] Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926).
[150] Sumner Lumber Co. v. Pacific Coast Power Co., 72 Wash. 631, 131 Pac. 220 (1913); See II KINNEY, IRRIGATION AND WATER RIGHTS, § 747 (2nd ed. 1912).
[151] U.S. v. Big Bend Transit Co., 42 F. Supp. 459 (E. D. Wash. 1941); *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924). Other cases wherein the question has been discussed: Grant Realty Co. v. Ham, Yearsley & Ryrie, 96 Wash. 616, 165 Pac. 495 (1917); Pleasant Valley Irr. Co. v. Okanogan, 98 Wash. 401, 167 Pac. 1122

defeat an appropriative right where only two parties are involved.[152]

The final step requisite to perfecting an appropriation is to apply the water to a beneficial use with the intent to appropriate.[153] The appropriator may apply the water to any beneficial use he chooses,[154] and, in changing from one use to another, he neither lessens his rights nor forfeits his priority.[155] An appropriation can be made for any beneficial purpose,[156] and what constitutes a beneficial purpose varies; however, some of the more usual beneficial uses are: domestic, irrigation, stock watering, storage, mining and milling, and the generation of heat, power and electricity.[157] From decisions of other jurisdictions, it might be said that a beneficial use involves an application of the water in an exclusive manner [158] so as to reap an economic as distinguished from an aesthetic benefit for the appropriator.[159]

When an expectant appropriator is proceeding under the current permit system the application submitted for a permit to appropriate water contains limitations of both time and quantity on the requested appropriative right.[160] It restricts the appropriator to the exact nature and amount of water originally claimed by him for the proposed use as well as the exact time during which water will be required each year.[161] The water code employs a "second foot"[162] and an "acre foot"[163] as its units of measurement.[164] Prior to the water code a many times indefinite unit of measurement known as the "miner's inch"[165] was utilized.[166]

(1917); Still v. Palouse, 64 Wash. 606, 117 Pac. 466 (1911). Also see I WIEL, WATER RIGHTS IN THE WESTERN STATES § 383 (3rd ed. 1911).

[152] State v. Anderson, 134 Wash. 331, 235 Pac. 809 (1925).

[153] I WIEL, WATER RIGHTS IN THE WESTERN STATES § 377 (3rd ed. 1911).

[154] U.S. v. Big Bend Transit Co., 42 F.Supp. 459 (E.D. Wash. 1941).

[155] *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924); U.S. v. Big Bend Transit Co., 42 F. Supp. 459 (E. D. Wash. 1941). *But cf.* Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1889). Provided, of course, that they have not been fixed by a prior decree. See Helensdale Water Co. v. Blew, 146 Wash. 350, 262 Pac. 958 (1928).

[156] See Thompson v. Pennebaker, 173 Fed. 849 (9th Cir. 1909).

[157] See Basey v. Gallagher, 87 U.S. 670 (1875), and I WIEL, WATER RIGHTS IN THE WESTERN STATES § 378 (3rd ed. 1911).

[158] Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 166 Pac. 309 (1917).

[159] Empire Power Co. v. Cascade, 205 F. 123 (8th Cir. 1913).

[160] RCW 90.20.020.

[161] *Ibid.*

[162] This means a flow of water equal to one cubic foot per second.

[163] This means a unit of water volume equal to forty-three thousand five hundred and sixty cubic feet.

[164] RCW 90.04.010.

[165] This means the amount of water capable of flowing through a hole one inch square under a certain head pressure of water. It was unreliable because the amount varies directly with the head pressure and no standard head pressure was employed although four inches was common. See I WIEL, WATER RIGHTS IN THE WESTERN STATES § 486 (3rd ed. 1911).

[166] Longmire v. Smith, 26 Wash. 439, 67 Pac. 246, 58 L.R.A. 308 (1901).

However, the absolute limitation on the appropriative right is the amount of the water actually taken and put to a beneficial use[167] and not all of the water that has been diverted.[168] When the court applies the doctrine of "relation back" and is considering "due diligence", the quantity of the water appropriated becomes a movable limit which may gradually increase, and it can be inferred from the quantity of the land occupied by the appropriator, with its boundaries thus defined and claimed.[169]

An appropriator has the right to change the point of diversion and the place of use of his water rights provided the change can be made without injury to existing rights, but the appropriator may not do so without permission from the supervisor of water resources.[170] This applies to a permanent or temporary change including rotation in the utilization of water for a more economical use.[171] An approved change in the point of diversion affects neither the priority rights to the use of water[172] nor the existence of any of the rights.[173] However, where the benefits of sub-irrigation would be lessened and springs dried up from changing streamflow to other lands, the right to change the point of diversion will be denied even though a temporary permit has been issued.[174] Interested parties opposing a change in the place where a water right is used have the burden of showing that the proposed change would prejudice their rights.[175]

The appropriative water right can be lost by an abandonment where an actual relinquishment of its use coexists with an intention to abandon.[176] These two elements must be proved to exist simultaneously, and as a consequence, abandonment is always voluntary and a question of fact with the burden of proof on the party alleging its existence.[177]

[167] Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641 (1910); Ortel v. Stone, 119 Wash. 500, 205 Pac. 1055 (1922); see RCW 90.20.070.

[168] *See* Beetchenow v. Bartholet, 162 Wash. 119, 298 Pac. 335 (1931); I WIEL, RIGHTS IN THE WESTERN STATES § 478 (3rd ed. 1911).

[169] Longmire v. Smith, 26 Wash. 439, 67 Pac. 246 (1901); *approved* in *In re* Crab Creek and Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925).

[170] RCW 90.28.090; U.S. v. Union Gap Irr. Co. 209 Fed. 274 (E. D. Wash. 1913).

[171] RCW 90.28.100.

[172] *In re* Ahtanum Creek, 139 Wash. 84, 245 Pac. 758 (1926).

[173] *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924); U.S. v. Big Bend Transit Co. 42 F. Supp. 459 (E. D. Wash. 1941).

[174] Haberman v. Sander, 166 Wash. 453, 7 P.2d 563 (1932) *followed in* Lawrence v. Sander, 166 Wash. 703, 7 P.2d 567 (1932) *rehearing denied* Lawrence v. Sander, 169 Wash. 705, 14 P.2d 961 (1932). See also White Bros. Co. v. Watson, 64 Wash. 666, 117 Pac. 497 (1911).

[175] Osborn v. Chase, 119 Wash. 476, 205 Pac. 844 (1922).

[176] Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913). They may also be lost by forfeiture, adverse use, estoppel, or through eminent domain proceedings. See I WIEL, WATER RIGHTS IN THE WESTERN STATES § 478 (3rd ed. 1911).

[177] See Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641 (1909). Failure to mention

Non-user alone is not sufficient to effect an abandonment of the water right; it is merely evidence of intent to abandon.[178] Eleven years non-use of a ditch has been held to be an abandonment of the right to discharge waste waters into it.[179]

The appropriative water right cannot be lost through a forfeiture for non-use in this state because there is no general forfeiture statute.[180] However, since the essence of the doctrine of prior appropriation lies in the philosophy of putting water to its highest beneficial use, a forfeiture statute for non-user should be enacted in order to insure the furtherance of this philosophy. If such a statute were enacted, the result would produce a statutory pattern common to that in other western states.[181]

water rights in a deed is not evidence of abandonment. Pays v. Roseburg, 123 Wash. 82, 211 Pac. 750 (1923).

[178] Thorp v. McBride, 75 Wash. 466, 135 Pac. 228 (1913).

[179] Phillips v. Coumbe, 90 Wash. 543, 156 Pac. 535 (1916).

[180] *But cf.* RCW 90.20.090. There is a forfeiture provision in the Ground Water Code, RCW 90.44.190.

[181] *E.g.*, Arizona, California, Idaho, Nevada, Oregon, Utah, and Wyoming.